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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1622

GAITHER DEAN PREVETTE, ET. AL.,
Petitioners,

- vs -

STATE OF NORTH CAROLINA
Respondent.

Petition for a Writ of Certiorari to the North Carolina Court of Appeals

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The Petitioners, Gaither Dean Prevette, William Norman Stafford, Walter Lee St. John, Randy Marylon Grimes, Phillip Mark Sutton, and Francis Earl Wood, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the North Carolina Court of Appeals in this proceeding on November 6, 1979.

OPINION BELOW

The opinion of the North Carolina Court of Appeals is reported in 43 N.C. App. 450, 259 S.E. 2d 595. The Judgment of the Supreme Court of North Carolina, dismissing Petitioners' Appeal and denying their Petition for Discretionary Review, is reported in 299 N.C. 124, 262 S.E. 2d 8 (1980).

JURISDICTION

The judgment of the North Carolina Court of Appeals was entered on November 6, 1979. Petitioners' Appeal and Petition for Discretionary Review were denied by the Supreme Court of North Carolina in an Order filed on January 17, 1980, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

1. Does the "plain view" doctrine authorize the warrantless seizure of evidence from a back room of a residence after evidence is observed in a front room of the residence?

2. Does the "plain view" doctrine authorize entry into a residence after evidence is observed inside the residence by a police officer standing outside the residence?

3. Is the "plain view" doctrine's requirement of an initial lawful intrusion satisfied where an officer observes contraband inside a residence, while looking through the front door from the porch outside the residence, after going to the door in response to an anonymous tip that contraband was present in the residence?

4. Is the "plain view" doctrine's requirement of an inadvertent discovery satisfied where an officer observes contraband inside a residence, while looking through the front door from the porch outside the residence, after going to the door for the purpose of trying to locate contraband in response to an anonymous tip that contraband was present in the residence?

5. Is the "plain view" doctrine's requirement of exigency satisfied where an officer goes to a residence in response to an anonymous tip that the residence was "hanging full" of marijuana, detains a suspect outside the residence, observes marijuana on the floor of a room inside the residence from his position outside the residence, and would be unable to procure a search warrant in less than one hour?

6. Does the "open fields" exception to the Fourth Amendment permit the search of farm buildings around a residence that is 300 yards from the nearest (unpaved) public road, not visible from the public road, and accessible only by a one-lane farm road marked by a no trespassing sign and blocked by a farm tractor?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

United States Constitution, Amendment XIV:

§1. All person born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Nature and Course of the Proceedings:

The Petitioners were charged in separate bills of indictment, returned by the Lenoir County Grand Jury on November 7, 1977, with the felonious possession with intent to manufacture, sell and deliver the controlled substance marijuana on September 22, 1977.

Prior to the trial, Petitioners moved to suppress all evidence seized, on September 22, and 23, 1977, pursuant to a search of land and buildings described as Wood's Dairy Farm, Route 3, La Grange, North Carolina.

In March, 1978, the motions to suppress came on for hearing in Lenoir County Superior Court. The Court heard evidence and argument and entered an Order denying the motions to suppress.

Petitioners excepted to the Court's Order, preserved their right to appeal from that Order pursuant to N.C.G.S. §15A-

979, and entered pleas of guilty to the charges contained in the indictments on March 23, 1978.

The Court entered judgments sentencing Petitioners Prevette, Stafford, St. John, Sutton, and Wood to terms of imprisonment of two years, and Petitioner Grimes to a term of probation of four years.

Petitioners gave notice of appeal to the North Carolina Court of Appeals. In an opinion filed on January 16, 1979, that Court remanded the case to Lenoir County Superior Court for a factual determination of whether Petitioners had standing to object to the search. *State v. Prevette*, 39 N.C. App. 470, 250 S.E.2d 682 (1979). The Supreme Court of North Carolina denied Petitioners' Petition for Discretionary Review of this decision. *State v. Prevette*, 297 N.C. 179, 254 S.E.2d 38 (1979).

The Lenoir County Superior Court held a hearing on September 4, 1979, and concluded that Petitioners did have standing to challenge the legality of the search. Respondent did not appeal from that determination.

The North Carolina Court of Appeals, in an opinion filed on November 6, 1979, affirmed the Superior Court's original denial of Petitioners' motions to suppress. *State v. Prevette*, 43 N.C. App. 450, 259 S.E.2d 595 (1979). Petitioners' Appeal and Petition for Discretionary Review, filed in the Supreme Court of North Carolina on December 7, 1979, were dismissed and denied by Order filed on January 17, 1980. *State v. Prevette*, 299 N.C. 124, 262 S.E.2d 8 (1980).

Statement of Facts:

At the initial hearing on Petitioners' motions to suppress in Lenoir County Superior Court, there was evidence to show the following:

At about 6:00 p.m. on Thursday, September 22, 1977, Lenoir County Deputy Sheriff Robert Pelletier received an anonymous telephone call at the Sheriff's Office in the Courthouse in Kinston, North Carolina. The caller said that "there was an abandoned house near Wood's Dairy Farm hanging full of marijuana." (Record on Appeal in the North Carolina Court of Appeals, page 24.) The caller refused to meet with Deputy Pelletier but told him that he (the caller) would be back in touch later. (R.p. 24)

Deputy Pelletier notified Sheriff's Detective William E. Smith and, after Pelletier completed an assignment as security guard at the airport, he met at the Sheriff's Office

with Smith and three Kinston City Police Detectives at about 10:00 p.m. (R.p. 25)

Deputy Pelletier was familar with Wood's Dairy Farm in the Jenny Lind Section of rural Lenoir County, having been raised in the old Herring house near there (R.p. 26, 31). The Officers believed that the description given by the caller fit both the Herring house and the Wood's Dairy Farm residence (R.pp. 24, 43, 52, 53). They believed the Herring house to be abandoned (R. pp. 26) but were not sure whether the Wood's house was occupied or not (R.pp. 26, 39, 44, 63). At the Sheriff's Office meeting, they discussed the insufficiency of the information to obtain a search warrant and neither sought nor obtained a search warrant from the Magistrate (R.p. 57) on duty in the Courthouse, one floor below, and thirty or forty yards from, the Sheriff's Office (R.p 58).

Following a discussion of several minutes, the Officers decided to ride up there (R.p. 25) and check the two houses (R.p. 53) and the buildings on Wood's Dairy Farm (R.p. 25). Their purpose in going was to "look for the marijuana" (R.p. 33, 43, 54) and try "to get probable cause." (R.pp. 43, 54). They "were not going to call on anybody's residence and ask any questions." (R.p. 43).

After a twenty-minute drive in two unmarked cars, they arrived at the Herring house which they searched and found to be empty (R. pp. 26, 31, 32, 44). They left there and drove toward Wood's Dairy Farm, going back to the paved road, turning from there onto an unpaved road, and driving until they reached the turn-off to the Wood's Dairy Farm path (R.p. 32). This path, which served only, and led only to, the Wood's residence, was a "real crooked," one-lane, two-wheel-rutted farm road that went directly to the front of the Wood's residence (R. p. 32). From the unpaved state road to the Wood's residence, the path was several hundred yards long (R.p. 27) and the house was not visible from the state unpaved road (R.p. 38). About half-way along the path to the house, there was a fence (R.p. 32).

The Officers turned onto this path and drove until they came to a point where it crossed an earthen bridge (R.p. 32) on each side of which was a ditch (R.pp. 38-39). On the bridge, blocking the path, was a large farm tractor (R. pp. 27, 38). Beyond the tractor, about fifty yards further up the path, the Officers could see the Wood's residence (R. p. 27). [To the left of the tractor, a "No Trespassing" sign on a post was not seen by the Officers at this time (R. pp. 27, 53, 65) but was seen by them, "clearly readable" (Rp. 53), the next day (R.pp. 53, 65)].

The Officers stopped and exited their cars behind the tractor (R. pp. 27, 46). It was about 11:00 p.m. (R. p. 27). From this point, they could see the house (R. p. 27). Deputy Pelletier saw that the front porch light was on (R. p. 27). Sheriff's Detective Smith saw that a light was on inside the house in either the kitchen or den area (R. p. 46). City Police Detective Larry Green observed "that there were lights on the inside of the house." (R. p. 65).

Walking around the tractor, the Officers (all in plain clothes except Pelletier) proceeded toward the front of the house with their flashlights off (R. p. 46). As Deputy Pelletier walked onto the front porch, there was a noise from the side of the house "like somebody came out the side door" (R. p. 27), "like a door slamming." (R. p. 46). The Officers ran to the side yard and observed a person "running all out" from the middle side of the house. He ran and jumped into a corn field that was located behind the house, about twenty yards from the back door of the house, and landed in a lying position about five yards into the field (R. p. 46). The Officers got the man to his feet and it was Petitioner St. John. The Officers questioned him and he denied living in the house or knowing who lived there ((R. p. 47). City Detective Green observed green residue on his clothing and face and detected the odor of marijuana about his person. (R. p. 66).

The Officers walked Petitioner St. John onto the front porch and up to a doorway that opened into the house at the end of the porch (R. p. 28). This doorway was barred by a closed screen (R. p. 28) and Deputy Pelletier detected no odor from the house (R. p. 28) and observed nothing that he considered to be contraband (R. p. 34). Sheriff's Detective Smith, however, detected a "musky odor that smelled like vegetable material of some kind" and observed "scattered leafy material on the floor" (R. p. 348) that he "guessed," but did not know, was marijuana (R. p. 55).

The Officers, led by Deputy Pelletier, then entered the house (R. p. 29) into the kitchen, where they observed a working refrigerator, canned goods, a stove, and table ware (R. pp. 35, 37).

They then proceeded to search the house and found bedrooms, a bath room, a small back room, beds, blankets, and sheets (R. pp. 35, 37). In closets and a back bedroom, the Officers found Petitioners Prevette, Stafford, and Grimes (R. p. 67) and brought them to the front room with Petitioner St. John (R. p. 30). Thereafter, on the floor of the small back room, the Officers found a pasteboard box containing what they

believed to be marijuana stems (R. p. 29). The four Petitioners in the front room were then arrested (R. p. 49). Some of the Officers then went outside, checked the outbuildings, and, after about ten minutes, reported back that they were full (R. p. 30). Petitioner Sutton was then arrested after he approached, and then tried to leave, the premises in a pick-up truck (R. pp. 50-51).

Thereafter, that night and the following day, Officers searched the premises of the farm and found a ten-acre field of plowed up marijuana stalks, a ten-foot high pile of marijuana stalks, and a packhouse, three grain bins, and a tobacco barn filled with marijuana (R. p. 93). Altogether, the material discovered totalled approximately eight tons (R. p. 51). The Officers took samples and destroyed the remainder (R. p. 52).

One or two weeks after these events, Sheriff's Detective Smith prepared and filed an official report in which he indicated that the officers had "stumbled across" the marijuana after going to the house to look for a suspect in a breaking and entering case (R. p. 97). Later, he filed a second report in which he told "exactly what had happened." (R. p. 97).

REASONS FOR GRANTING THE WRIT

A. BASES OF THE DECISION BELOW

The North Carolina Court of Appeals held that the search was proper and that marijuana seized from the residence and the outbuildings was admissible. The Court based this decision on the following conclusions:

1. The seizure of the marijuana from a back room of the residence was justified by the officers' observation of marijuana scattered on the floor of a front room of the residence (Implicit).

2. The "plain view" doctrine applies because officers may enter and search a residence without a search warrant if they observe, from outside the residence, contraband inside the residence, so long as the conditions for application of the doctrine are present.

3. The conditions for application of the "plain view" doctrine were present in this case because the officers observed and smelled marijuana inside the house, from their position at the door outside the house, and

   a. The officers were lawfully at the door outside the house,

   b. The officers discovered the marijuana inadvertently, and
   c. The officers were confronted with exigent circumstances.

4. The seizure of marijuana from the outbuildings around the residence was proper because of the "open fields" exception to the Fourth Amendment.

B. APPROPRIATENESS OF REVIEW

The decision of the North Carolina Court of Appeals is appropriate for review by this Court because its major premises, outlined above, are in conflict in principle with the decisions of this Court.

1. Scope of the Plain View Search

The North Carolina Court of Appeals analyzed the search issue in terms of the "plain view" doctrine. The Court found the conditions of the doctrine satisfied and held that the marijuana was properly seized from the residence because the officers entered and seized marijuana after seeing and smelling marijuana inside the house from their position outside the house.

The marijuana seized from the residence—the marijuana at issue in the case—was not the material that was seen inside the house by the officers.

After the officers brought Petitioner St. John from the corn field to the front porch of the house, Deputy Smith was able to see through the screen door into the first room. In that room, he saw "scattered leafy material on the floor." It was "not in large quantities, just scattered." (R. p. 48). From this observation, and the accompanying odor, he concluded that the material was marijuana (R. p. 48).

At that time, all five officers "entered and proceeded to search the house" (R. p. 37). Deputy Smith testified: "After we got into the kitchen room, the officers started through the house with their flashlights to see if there was any other subjects in the house." (R. p. 49). During the course of this search, three of the Petitioners were found in the house (R. p. 29).

After these people were found, they were brought to the front room. Then, a pasteboard box was observed on the floor of a back room. (R. pp. 29, 49). This box, described as being "approximately 8 inches deep and 18 to 24 inches wide," had no

lid and was one-half to three-fourths full of what the officers recognized as marijuana (R. pp. 29, 49). Deputy Smith seized the box, carried it into the kitchen, and arrested the subjects (R. p. 49).

(Apparently, the material first seen by the officers through the screen door was not seized.)

The room in which the box was found was located at the back of the house with two full rooms (kitchen and dining room) between it and the door through which entry was made (R. p. 35). From the porch outside that door, "there would have been no way possible to have seen the contents of the box ... in the back room." (R. p. 36).

The purpose of the plain view doctrine is to permit the seizure of clearly visible items without the necessity of a search warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, 91 S.Ct. 2022 (1971). And the scope of any search is limited by the circumstances by which it is justified. *Chimel v. California*, 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969).

The North Carolina Court of Appeals held, in effect, that a house may be entered and completely searched if officers outside the house see contraband anywhere inside the house. That holding is not justified by any reading of the plain view doctrine.

2. The Plain View Doctrine as Justification for Entering A Residence.

The plain view doctrine does not provide justification for a law enforcement officer to *enter* a private residence and seize items located within the residence. Knowledge of the presence of contraband within a residence, no matter how certain and no matter how acquired, does not justify a warrantless *entry* and seizure. *Vale v. Louisiana*, 399 U.S. 30, 26 L.Ed.2d 409, 90 S.Ct. 1969 (1970); *Chapman v. United States*, 365 U.S. 610, 5 L.Ed. 2d 828, 81 S.Ct. 776 (1961); *Jones v. United States*, 357 U.S. 493, 2 L.Ed. 2d 1514, 78 C.Ct. 1253 (1958); *McDonald v. United States*, 335 U.S. 451, 93 L.Ed. 153, 69 S.Ct. 191 (1948); *Johnson v. United States*, 333 U.S. 10, 92 L.Ed. 436, 68 S.Ct. 367 (1947); *Taylor v. United States*, 286 U.S. 1, 76 L.Ed. 436, 52 S.Ct. 466 (1931); *Agnello v. United States*, 269 U.S. 20, 70 L.Ed. 145, 46 S.Ct. 4 (1925).

The North Carolina Court of Appeals relied on the language of *Coolidge v. New Hampshire, supra*, to justify application of the plain view doctrine in the present case. But *Coolidge* involved the seizure of a vehicle from a driveway and a

subsequent search of that vehicle. Nothing in that decision suggests that an officer's observation *into* a residence, from *outside* the residence, dispenses with the requirement that the decision to permit entry into a dwelling must be made by a magistrate.

3. Lawfulness of the Officers' Presence

If the plain view doctrine can justify entry into this residence, and the seizure of the box of marijuana, then it can do so only if the conditions for application of that doctrine were present. The first of those conditions is that the officer making the observation must have done so from a place where he had a right to be. *Coolidge v. New Hampshire, supra; Harris v. United States*, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968).

The North Carolina Court of Appeals recognized this condition and found that the officers were properly on the front porch at the door because they were there "to conduct a general inquiry and investigation." *State v. Prevette, supra* at 455.

As will be discussed more fully in the following section, the facts of this case do not support that conclusion. Both Deputy Pelletier and Sheriff's Detective Smith testified that they went to the residence to find the marijuana (R. pp. 33, 53). To denominate such a mission an "investigation" does not alter the fact that it was, in truth, a search.

Police officers, like other citizens, may go to the door of a residence to make legitimate general inquiry. But, to permit officers to go to the door of a residence in the dark of night, looking for marijuana, after receiving an anonymous tip that marijuana is present, would make a sham of Fourth Amendment search warrant procedure. An officer in possession of information establishing probable cause to search may go to the door of a residence only if he first submits that information to a magistrate and obtains a warrant. *McDonald v. United States, supra; Johnson v. United States, supra.* It would be anomalous indeed to permit an officer in possession of information that arouses suspicion but does not establish probable cause to go to the door of a residence in an effort to see the contraband through a window or door.

4. Inadvertency of Observation

In *Coolidge v. New Hampshire, supra*, the Court held that plain view justifies a seizure only if the evidence was discovered inadvertently.

The North Carolina Court of Appeals recognized this requirement but held that it was satisfied by the fact that the officers saw marijuana inside the house through the screen door.

The Court's conclusion begs the question. The issue raised by the inadvertency requirement is whether the officers *anticipated* the discovery. *Coolidge v. New Hampshire, supra.* As this Court pointed out in *Coolidge*, the requirement of inadvertency has two purposes. *First*, it assures that officers who have probable cause prior to the seizure secure a search warrant. *Second*, it assures that officers who do not have prior probable cause may not "justify a planned warrantless seizure by maneuvering themselves within 'plain view' of the object they want." Id., n. 26, at 469, 29 L.Ed.2d at 585, 91 S.Ct. at 2052.

Under no reasonable analysis of the facts in this case may the discovery of this marijuana be characterized as inadvertent. Tested by the *subjective* intent of the officers, it is clear that they went to the premises for the purpose of finding the marijuana. The officers testified at the suppression hearing that, when they left the Sheriff's Office for the Wood's Dairy Farm area, it was their "intention to try to locate the marijuana" (R. p. 54) and they "had no idea of going to any houses in that area other than the two, the Herring house and the Wood's Dairy house." (R. pp. 53, 73). When they parked their cars on the Wood's Dairy Farm road and started walking toward the residence, they were "going there to look for the marijuana." (R. p. 33). Their "sole purpose in going there was to seek the marijuana that had been described in the phone call." (R. p. 53). After the officers took custody of Petitioner St. John outside the house, and walked him to the screen door, Sheriff's Detective Smith looked in and saw material on the floor. He testified: "I knew it was green vegetable material and I guessed it was marijuana because I was looking for it and expected it to be there." (R. p. 55). The evidence also indicates that the officers consciously undertook a plan to make their purposeful discovery appear to be inadvertent. Two weeks after the seizure, Deputy Smith filed a report in which he "gave the understanding" that they were looking for a breaking and entering suspect and "stumbled on the house." (R. p. 97). One month later, he filed a revised report (R. p. 97).

Tested by *objective* standards, it would also be inaccurate to describe the discovery as inadvertent. The information received from the anonymous tipster was that there was a house "hanging full of marijuana." (R. p. 24). The only conceivable purpose of an on-site examination of the two

suspect houses would be to observe the marijuana. That is a search.

The North Carolina Court of Appeals' conclusion that this discovery was inadvertent clearly conflicts with the decision in *Coolidge v. New Hampshire, supra.*

5. Exigency of Circumstances

With the exception of consent and arrest searches, warrantless searches are not proper except in "exigent circumstances." *Arkansas v. Sanders*, 442 U.S. 753, 61 L.Ed.2d 235, 99 S.Ct 2586 (1979); *Vale v. Louisiana, supra; Coolidge v. New Hampshire, supra.* Inconvenience and delay are not sufficient in themselves to constitute the exigent circumstances necessary to justify a warrantless search. *Johnson v. United States, supra.* What is required are "circumstances in which police action literally must be 'now or never' to preserve the evidence of the crime." *Roaden v. Kentucky*, 413 U.S. 496, 505, 37 L.Ed.2d 757, 765, 93 S.Ct. 2796, 2803 (1973).

In the present case, the North Carolina Court of Appeals concluded that the circumstances were exigent because, as the Trial Court concluded, the contraband might be destroyed, other suspects might be in the area, it would have taken an hour to get a search warrant, and the possessors were aware of the police presence.

The officers, however, had information that there was a large quantity of marijuana. When they observed marijuana in the house, they could have arrested Petitioner St. John and secured the premises until a search warrant could be obtained. *Coolidge v. New Hampshire, supra; United States v. Jeffers*, 342 U.S. 48, 96 L.Ed. 59, 72 S.Ct. 93 (1951). In view of this option, it can hardly be said that this was the kind of now or never situation envisioned by *Roaden v. Kentucky, supra.*

6. The Open Fields Exception

After the subjects were rounded up, placed in the front room, and arrested, Deputy Pelletier watched them while some of the other officers went "to check the rest of the buildings." (R. p. 30). After about ten minutes, one of the officers returned and reported "that all the buildings were full." (R. p. 30). Thirty minutes later, Petitioners were taken to the courthouse (R. p. 30). Subsequently, during the night and the next day, all of the buildings were searched.

The North Carolina Court of Appeals approved this search of the outbuildings on the basis that the Fourth Amendment protection does not extend to "open fields."

It is true that this Court has held that the Fourth Amendment's protection does not include open fields. *Hester v. United States*, 265 U.S. 57, 68 L.Ed.2d 989, 44 S.Ct. 445 (1924). This Court has also held that no Fourth Amendment issue arises where evidence is obtained without a physical trespass. *Olmstead v. United States*, 277 U.S. 438, 72 L.Ed. 944, 48 S.Ct. 564 (1928). More recently, however, the Court has rejected analysis of Fourth Amendment issues in traditional property terms and has held that protection from unreasonable search and seizure extends to what a person reasonably seeks to preserve as private. *Katz v. United States*, 389 U.S. 347, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).

If one has a reasonable expectation of privacy in a public telephone booth, as in *Katz, supra*, surely one has a reasonable expectation of privacy in outbuildings located on a farm 300 yards from the nearest (unpaved) road, and accessible only by a one-lane farm road marked by a no trespassing sign and blocked by a tractor.

Even if the facts are analyzed in terms of property law, it is not realistic to conclude that these farm buildings were equivalent to open fields. In North Carolina, a person's home includes his dwelling and other buildings within the curtilage. *State v. Harrison*, 239 N.C. 659, 80 S.E.2d 481 (1954). The curtilage includes the land, enclosed or not, commonly used with the dwelling. *State v. Frizelle*, 243 N.C. 49, 89 S.E.2d 725 (1955); *State v. Twitty*, 2 N.C. 102 (1794).

In any event, the grounds and outbuildings around the Wood's residence were searched, not because they were in open fields, but because of the prior search of the residence. Thus, evidence obtained as a result of that search was the product of the illegality of the search of the residence and was, therefore, inadmissible. *Wong Sun v. United States*, 371 U.S. 491, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 64 L.Ed. 319, 40 S.Ct. 182 (1920).

C. IMPORTANCE OF REVIEW

Review by this Court of the North Carolina Court of Appeals' decision is not only appropriate but important.

In the first place, review is important because each of the separate components of the decision, discussed above, is an important aspect of the law of search and seizure.

In the second place, review is important because of the overall thrust of the opinion in the Court below. Reduced to its essence, the case stands for the following proposition: A police

officer who receives an anonymous tip that contraband is located in either one of two dwellings may go to those dwellings in hopes of finding the contraband. That type of door-to-door search smacks of the general warrant or writ of assistance from which the Fourth Amendment provides protection. *Lo-Ji Sales v. New York*, 442 U.S. 319, 60 L.Ed.2d 920, 99 S.Ct. 2319 (1979); *Marshall v. Barlow's Inc.*, 436 U.S. 307, 56 L.Ed.2d 305, 98 S.Ct. 1816 (1978); *Stanford v. Texas*, 379 U.S. 476, 13 L.Ed.2d 431, 85 S.Ct. 506 (1965).

When a police officer receives anonymous information, not sufficient to establish probable cause, that contraband is located in a particular residence, or in one of several residences, may he go to the door to investigate? It is important that the question be answered. As pointed out in *Dunaway v. New York*, 442 U.S. 200, 213, 60 L.Ed.2d 824, 836, 99 S.Ct. 2248, 2257 (1979): "A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the North Carolina Court of Appeals.

Respectfully submitted,

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April 14, 1980

APPENDIX I

Excerpts from Record Indicating Presentation of Federal Questions Below:

A. In the Trial Court, a motion substantially like the one which follows, was filed on behalf of each Petitioner:

(From Record pages 18-20):

MOTION TO SUPPRESS AND EXCLUDE EVIDENCE — NOS. 77 CR9031, 77 CR9032, 77 CR 9033 (Filed January 3, 1978)

NOW COMES the Defendant, Phillip Mark Sutton by counsel of record Thomas J. White, and proceeding pursuant to N.C.G.S. Section 15A-974 moves to suppress and exclude certain evidence which the Defendant alleges was unlawfully obtained, said evidence being the following:

> All evidence consisting of or pertaining to approximately sixteen thousand pounds of material alleged to be marijuana or any part thereof found and seized on or about September 22 and 23, 1977, on land and in buildings described as Wood's Dairy Farm on Route 3, LaGrange, North Carolina, in Lenoir County, North Carolina, and especially including, but not limited to, the following: Cardboard boxes of green vegetable material with gloves inside said boxes; two feed bags of green vegetable material found near a cow shelter; dried green vegetable plants in a shelter or any other building near a dwelling; green vegetable material found on and taken from certain farm equipment located on the Wood's Dairy Farm; and any other green vegetable material found on the premises known as Wood's Dairy Farm on, in, or about any of the buildings thereon, and any and all paraphernalia seized which is designed to be or could be used in or associated with the production, manufacture, packaging, processing, repackaging, possession, use, sale, or distribution of marijuana; and any other articles seized or held by the State of North Carolina which the aforesaid State intends to offer or attempt to offer into evidence against the Defendant, Phillip Mark Sutton.

Grounds upon which this motion is interposed are the following:

I. The vegetable material, plants, paraphernalia and other objects and articles mentioned in this MOTION TO SUPPRESS AND EXCLUDE EVIDENCE were seized and possession of the same obtained by means of a warrantless search of the described premises under conditions requiring the use of a valid search warrant, which search was unreasonable, without the consent of any person, without probable cause, not incidental to a valid arrest, without said seized articles and objects being in the category of contraband in plain view of officers lawfully upon the premises where the same was seized, and therefore unreasonable under the protection provided by the Fourth Amendment of the United States Constitution, and therefore, the exclusion of said evidence so seized is required by the Constitution of the United States and by the Constitution of the State of North Carolina.

II. The exclusion of any statement whether oral or written alleged to have been made by the Defendant, Phillip Mark Sutton under the facts and circumstances of the above numbered cases is required by the provisions of the Fifth and Sixth Amendments of the United States Constitution and by Section 23 of Article I of the Constitution of the State of North Carolina.

An Affidavit containing facts supporting this MOTION TO SUPPRESS AND EXCLUDE EVIDENCE is attached.

WHEREFORE, the Defendant, Phillip Mark Sutton, prays the Court:

1. That pursuant to N.C.G.S. Section 15A-977 (b) an order issue which summarily suppresses the above described evidence or, in the alternative;

2. That a hearing be had on this MOTION TO SUPPRESS AND EXCLUDE EVIDENCE on the date the above numbered cases shall be regularly set for motion and arraignment and that at the conclusion of that hearing, the Court issue an order suppressing and excluding the evidence described herein.

RESPECTFULLY SUBMITTED, this 30th day of December, 1977.

WHITE, ALLEN, HOOTEN,
HODGES & HINES, P.A.
Attorneys for Phillip Mark Sutton
By: s/Thomas J. White
Attorney

B. In the North Carolina Court of Appeals:

(From Record page 164):

ASSIGNMENT OF ERROR NO. 3:

For that his Honor erred in overruling and denying the several Motions of the defendants to suppress and exclude evidence.

EXCEPTIONS: NOS. (Omitted).

APPENDIX II.

OPINION BELOW

STATE OF NORTH CAROLINA V. GAITHER DEAN PREVETTE, WILLIAM NORMAN STAFFORD, WALTER LEE ST. JOHN, RANDY MARYLON GRIMES, PHILLIP MARK SUTTON, AND FRANCIS EARL WOOD

No. 788SC753

(Filed 6 November 1979)

APPEAL by defendants from *Cowper, Judge.* Judgments entered 23 March 1978 in Superior Court, LENOIR County. Heard in the Court of Appeals 5 December 1978.

Defendants were charged with felonious possession of marijuana with intent to manufacture, sell, and deliver, a violation of the North Carolina Controlled Substances Act. Each defendant tendered a plea of not guilty, and the six cases were consolidated for trial. All defendants moved to suppress the evidence, approximately eight tons of marijuana, seized by officers. After a hearing pursuant to Section 979(b) of Chapter 15A of the General Statutes of North Carolina, the trial court found facts, made conclusions of law, and denied the motions. Each defendant then entered a plea of guilty, judgments were entered, and defendants appealed. Such facts as are necessary to this opinion appear below.

Attorney General Edmisten, by Assistant Attorney General Isham B. Hudson, Jr., for the State.

Gerrans & Spence, by C. E. Gerrans, for defendants Gaither D. Prevette, William N. Stafford, Walter L. St. John, and Randy M. Grimes.

White, Allen, Hooten, Hodges & Hines, by Thomas J. White and W. H. Paramore III, for defendants Phillip M. Sutton and Francis E. Wood.

MARTIN (Harry C.), Judge.

In *State v. Prevette*, 39 N.C. App. 470, 250 S.E. 2d 682, *disc. rev. denied*, 297 N.C. 179, 254 S.E. 2d 38 (1979), this Court held the stipulation by the state and defendants that all defendants had standing to challenge the validity of the searches and seizures was invalid and not binding upon it. We remanded to superior court for a factual determination of whether defendants

or any of them had a protectible interest in the searched premises under the Fourth Amendment of the United States Constitution. A hearing was held 4 September 1979. That court found facts and concluded that all defendants did have standing to challenge the legality of the search. The state did not except to this ruling of the trial judge; therefore, it is not presented to this Court for review.

We now address the question whether defendants have a meritorious challenge to the trial court's denial of their motions to suppress the evidence obtained by search and seizure.

Defendants initially object to certain findings of fact made by the trial judge at the hearing on their motions to suppress. They argue that these four findings are not supported by the evidence and even conflict with it.

The judge found that after receiving a telephone call from an "unknown tipster" who reported that a house near Wood's Dairy Farm in Lenoir County was full of marijuana, Deputy Sheriff Robert Pelletier discussed the tip with Kinston police officers. Having decided that the information was not sufficient to obtain a search warrant, "they decided to go to LaGrange to attempt to get further information about the situation by conducting a general inquiry and investigation of the area by determining whether or not the houses were occupied and then interviewing the occupants, if any; . . .." Defendants' objection to the quoted portion of the finding is based on testimony by four of the officers that their sole purpose in going to that section of the county was to locate the marijuana referred to in the phone call.

When the trial judge's findings of fact are supported by competent evidence they will not be disturbed on appeal, even though the evidence is conflicting. *State v. Small*, 293 N.C. 646, 239 S.E. 2d 429 (1977); *State v. Blackmon*, 280 N.C. 42, 185 S.E. 2d 123 (1971). We find competent evidence in the record to support this finding. Detective Lt. Smith of the sheriff's department testified: "We just decided to get in the car and go up to Jenny Lind and look for any signs of movement or anything else to give us an indication of where we should be looking primarily. We did not really have a plan." Furthermore, Smith testified: "We saw lights there, we were going to try to find out who was there or whatever. We were going to knock on the door." Other portions of the record also reflect the fact that the officers intended to conduct a general investigation of the area.

The judge found that the officers proceeded to check out two locations in the Jenny Lind section of Lenoir County, the site of Wood's Dairy Farm. They approached a house at the second location, using a dirt path. They had no search warrant. They encountered a tractor parked across the path. As they walked up to the house they heard a back door slam. One of the defendants ran from the door and attempted to hide in a cornfield. He was apprehended and questioned. He went with the officers to the front of the house. The officers stepped into the light at the front of the house. The front door was open but a screen door barred the entrance. Defendants object to the finding "that the officers standing on the porch could see through this screen door; that they then observed in plain view inside the house green vegetable material scattered on the floor, which, in their opinion appeared to be marijuana; also they smelled an odor from inside which to them smelled like marijuana; . . .." Here again, although Deputy Sheriff Pelletier testified that he did not detect any particular odor and could not see contraband or anything he considered to be contraband from the screen door, two other officers testified that they smelled marijuana and saw it scattered on the floor inside the house. This was competent evidence to support the challenged finding and it is conclusive on appeal.

The judge next found that the officers detected motion in the front room of the house and heard a noise of something or someone moving through the cornfield. They then entered the house searching for other suspects. Defendants object to the finding "that they searched the house finding three other defendants and additional marijuana in plain view; . . .." There is evidence that the pasteboard box of marijuana found in a back room of the house did not have a lid on it. One officer said the marijuana was "stacked in a pile protruding above the level of the box." There was evidence that another officer did not recall seeing anything sticking out above the top of the box. Conflicts in the evidence were for the trial judge to resolve.

Defendants finally object to the finding that in order to look for anyone who might have made the noise in the cornfield, two officers "proceeded outside and began to check the area, in the process of which, Hollowell discovered in plain view marijuana in some of the out buildings; . . .." There is competent evidence to support this finding that large quantities of marijuana were seen in the barn and other outbuildings during the course of checking the area for other suspects. Officer Harper testified:

We went outside and began looking around. Sgt. Hollowell and myself. I walked towards the back of the house and made a circle around the house. Sgt. Hollowell had walked out towards the barn. I checked around the house and started towards the barn out where Sgt. Hollowell was when he called me to the area and shined his flashlight up in the loft of the packhouse. And I shined mine there and we discussed the large amount of marijuana.

. . . .

. . . We had already looked in the packhouse and two grain silos. The grain silos contained large amounts of marijuana in bundles.

Defendants argue in their brief that since a constitutional challenge confronts this Court in the case at bar, they are entitled to a careful study of the record. A detailed, careful examination of the record has been made. The findings of fact made at the suppression hearing are supported by competent evidence. Since we so hold, we also find the court did not err in denying and overruling defendants' requests for specific findings of fact.

Judge Cowper made sixteen conclusions of law, thirteen of which are challenged by defendants, either wholly or partially. In addition, defendant Sutton assigned as error conclusion of law number fourteen, but he abandoned this assignment on appeal. Defendants argue generally that the conclusions of law are in the nature of findings of fact and are not supported by the evidence. Specifically, they contend that none of the recognized exceptions to the Fourth Amendment guarantee against unreasonable searches and seizures is present in this case.

[1] In *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed. 2d 564, *rehearing denied*, 404 U.S. 874 (1971), the United States Supreme Court held that under certain circumstances, police may seize evidence in plain view without a search warrant. Crucial to this plain view doctrine are the necessary circumstances: The officer must have a right to be where he is when the evidence comes into view, and he must inadvertently discover the incriminating object. A further limitation on the doctrine is dictated under *Coolidge*. Exigent circumstances must exist to justify a warrantless entry in order to seize evidence discovered in plain view.

In North Carolina a similar principle has been announced:

> "When an officer's presence at the scene is lawful (and at least if he did not anticipate finding such evidence), he may, without a warrant, seize evidence which is in plain sight and which he reasonably believes to be connected with the commission of a crime, even though the 'incident to arrest' doctrine would not apply; and such evidence is admissible."

State v. Bagnard, 24 N.C. App. 54, 57, 210 S.E. 2d 93, 95 (1974), *cert. denied*, 286 N.C. 416, 211 S.E. 2d 796 (1975). *See State v. Allison*, 298 N.C. 135, 257 S.E. 2d 417 (1979).

[2] Judge Cowper concluded as a matter of law that the officers were lawfully on the premises of Wood's Dairy Farm at the time they approached the house, based on his finding of fact that they went to that particular area to conduct a general inquiry and investigation. Entrance onto private property for the purpose of a general inquiry or interview is proper. *United States v. Brown*, 457 F. 2d 731 (1st Cir. 1972), *cert. denied*, 409 U.S. 843 (1972); *United States v. Knight*, 451 F. 2d 275 (5th Cir. 1971), *cert. denied*, 405 U.S. 965 (1972). Furthermore, officers are entitled to go to a door to inquire about a matter; they are not trespassers under these circumstances. *Ellison v. United States*, 206 F. 2d 476 (D.C. Cir. 1953). It was not erroneous for the judge to conclude that the officers, standing on the porch of defendants' house, were lawfully at the scene.

The judge's conclusion of law that the officers, while standing on the porch, "viewed in plain view and smelled on the inside of the house what appeared to them to be marijuana" is amply supported by his findings of fact and therefore meets the standard of appellate review.

The question remains whether the inadvertency requirement of the discovery of the evidence in plain view is met in this case. This Court recently confirmed the necessity of inadvertent observation of evidence in pointing out that the plain view exception to the Fourth Amendment has been restricted to "instances where the officer has legal justification to be at the place where he inadvertently sees a piece of evidence in plain view." *State v. Blackwelder*, 34 N.C. App. 352, 355, 238 S.E. 2d 190, 192 (1977). Inadvertent means fortuitous, by chance. In *State v. Howard*, 274 N.C. 186, 162 S.E. 2d 495 (1968), we find: "If the officers' presence was lawful, the observation and seizure of what was then and there apparent could not in itself be unlawful." *Id.* at 202, 162 S.E. 2d at 506. The judge's finding of fact that the officers could see

through the screen door and that they observed marijuana inside the house fulfills the inadvertency requirement of plain view.

This same finding of fact supports the conclusion of law "that this information, for the first time, gave rise to probable cause for the officers to search the residence in a lawful manner; . . .." Keeping in mind the warning in *Coolidge, supra*, that plain view of objects inside a house will furnish probable cause but will not, without exigent circumstances, authorize entry to seize without a warrant, we turn now to a review of the conclusion of law that "officers were confronted with exigent circumstances which required immediate action on their part to search the residence and premises not only for suspects but for more contraband; . . .."

In one of the leading cases which discuss the exigent circumstances or emergency exception, *United States v. Rubin*, 474 F. 2d 262 (3rd Cir. 1973), *cert. denied*, 414 U.S. 833 (1973), it is acknowledged that emergency circumstances may vary from case to case. Therefore, this Court must look to the record to see if, upon the facts of this particular case, the judge was correct in concluding that exigent circumstances were present. Although the judge denominated certain findings as conclusions of law, we read them as findings of fact and hold that they are supported by competent evidence and that they do support the conclusion of law that exigent circumstances were present. The relevant findings are as follows:

> 5. That the quantity of marijuana observed by the officers on the inside of the house was such that it was not improbable that the contraband could be destroyed or secreted by those desiring to do so, by whatever means, be they extreme or not, the possessors might choose;
>
> 6. That at the time the officers gained their probable cause, based upon the sounds that they heard in the area and the impressions that they had obtained from the surrounding circumstances, it was probable or reasonable for the officers to conclude that other suspects might be in the area who, under these circumstances, would present a danger to the officers' safety, would escape, or destroy the evidence if not prevented;
>
> 7. That at the time probable cause first ripened, the degree of urgency for the officers to act became immediate;

> that the amount of time it would have taken to get and serve a search warrant was great in that they would have had to have returned to Kinston, write out the affidavit, and return again to Wood's Dairy, taking at least one hour;
>
> 8. That the officers had reasonable grounds to believe that the possessors of this contraband were aware that the police were on their trails and in pursuit;

[3] These factual findings must also support Judge Cowper's conclusion of law that the exigent circumstances were sufficient to excuse the officers from the requirement of law to knock and announce prior to entry of the house. Defendants argue that the uncontested failure of the officers to knock on the screen door or to demand admittance before they entered the house should lead to the suppression of all evidence seized or gained by the state as a result of the alleged unconstitutional entry.

In *State v. Watson*, 19 N.C. App. 160, 198 S.E. 2d 185, *cert. denied*, 284 N.C. 124, 199 S.E. 2d 662 (1973), it was recognized that an entry which ordinarily required an announcement of purpose and demand for admittance might be proper without these procedures under special and emergency conditions: "when it reasonably appears that such an announcement and demand by the officer and the delay consequent thereto would provoke the escape of the suspect, place the officer in peril, or cause the destruciton of [*sic*] disposition of critical evidence." *Id.* at 165, 198 S.E. 2d at 188. It is important to note that this principle applies when a valid search warrant is the basis for the entry. Five years later, in *State v. Brown*, 35 N.C. App. 634, 242 S.E. 2d 184 (1978), this Court held that officers were not justified in making a forcible, unannounced entry into defendant's home based on their reasonable belief that notice of their entry would result in the destruction or hiding of evidence. In this case also, the officers acted while executing a valid search warrant. The Court stated: "In so far as *State v. Watson*, 19 N.C. App. 160, 198 S.E. 2d 185 (1973) is inconsistent with this opinion, we believe that it has been overruled by G.S. 15A-251." *Id.* at 637, 242 S.E. 2d at 187. N.C.G.S. 15A-251 governs searches made under warrants; N.C.G.S. 15A-249, which is cited within N.C.G.S. 15A-251, also governs searches under warrants. Our concern is whether in a warrantless search made under the exigent circumstances exception the same exigent circumstances may also justify the failure to knock and announce before entry.

We agree with the state's argument that they may and, in the case *sub judice*, do. It is clear from N.C.G.S. 15A-259 that the requirements of Article 11 of Chapter 15A apply only to searches made under warrants. The statute specifically provides: "Nothing in this Article is intended to alter or affect the emergency search doctrine." In addition, N.C.G.S. 15A-231 states: "Constitutionally permissible searches and seizures which are not regulated by the General Statutes of North Carolina are not prohibited." The exigent circumstances found by the trial judge, which are adequate to justify the warrantless search made by the officers in this case, are also sufficient to excuse the officers from the knock and announce requirement.

Finally, although defendants concede that Fourth Amendment protection against warrantless searches does not extend to open fields, like the field near defendants' house where marijuana stalks were discovered, *Hester v. United States*, 265 U.S. 57, 68 L.Ed. 898 (1924); *State v. Boone*, 293 N.C. 702, 239 S.E. 2d 459 (1977), they argue that evidence of the marijuana stalks should have been suppressed in accordance with the fruit of the poisonous tree doctrine, established in *Wong Sun v. United States*, 371 U.S. 471, 9 L.Ed. 2d 441 (1963). Since we agree with Judge Cowper's conclusion that there was no illegality in the officers' search of defendants' house and premises, we find *Wong Sun* inapplicable in this case.

The denial of defendants' motions to suppress and exclude the incriminating evidence found in and around their house as the result of a warrantless search is

Affirmed.

Chief Judge MORRIS and Judge PARKER concur.